Page Litho, Inc. *and* Graphic Communications International Union, Detroit-Toledo Local 289, AFL–CIO. Cases 7–CA–30106, 7–CA–30106(2), 7–CA–30569, and 7–CA–30569(2),

January 30, 1998

SUPPLEMENTAL ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On May 28, 1993, the Board issued a Decision and Order finding, inter alia, that Page Litho, Inc., the Respondent, committed various unfair labor practices in violation of Section 8(a)(5) and (1) of the Act; that the employees who engaged in a strike against the Respondent between September 1989 and January 1990 did so in protest over the Respondent's unfair labor practices and were unfair labor practice strikers; and that the Respondent was therefore obligated to offer to reinstate and make whole the strikers who unconditionally offered to return to work on January 18, 1990.[1] By unpublished decision dated August 28, 1995, the United States Court of Appeals for the Sixth Circuit issued a decision enforcing the reinstatement and make-whole provisions of the Board's Order.

Thereafter, during the compliance proceeding, certain issues arose with respect to the reinstatement and make-whole provisions, including, inter alia, whether certain of the former strikers effectively tolled the Respondent's backpay liability and waived their right to reinstatement by placing a condition on their acceptance of the Respondent's reinstatement offer. By letter dated May 1, 1997, the Regional Director notified the parties that he had determined that the Respondent made a valid offer of reinstatement to the strikers by letter dated March 30, 1990, but that the employees subsequently placed a condition on their acceptance of the Respondent's offer by insisting that the Respondent allow the union attorney to be present when they arrived at the Respondent's facility on the day and time indicated in the Respondent's letter, and leaving the premises when the Respondent refused to allow the attorney to do so. The Regional Director concluded that the employees' actions tolled Respondent's backpay obligation and waived the employees' right to reinstatement, citing *D'Armigene, Inc.*, 148 NLRB 2, 15 (1964); and *Reliance Clay Products Co.*, 105 NLRB 135 (1953).[2]

The Charging Party Union subsequently filed an appeal with the General Counsel of the Regional Director's determination that the employees waived reinstatement. The Union contended that the Respondent's March 30 letter asked the employees to attend a meeting on April 18, 1990, at 1:30 p.m., which was not the employees' regular starting time, and did not state that they were to report to work at the start of the morning shift.[3] Further, the Union contended that it felt it was necessary for the union presidents and attorney to be present when the employees responded to the Respondent's letter because the Respondent had previously improperly interrogated employees who had responded to a prior letter from Respondent in February 1990 inviting the employees to attend individual meetings. The Union contended that the employees at that time were interrogated about whether they were working elsewhere, whether they would come back to work under the terms set forth in the Respondent's final proposal, and whether they would sign something. Moreover, the Union contended that although the Respondent refused to allow the attorney into the April 18 meeting, the Respondent stated that it would allow the union presidents to come into the meeting. Thus, the Union contended that the Respondent was improperly attempting to designate which union representatives could be present at the meeting. Finally, the Union contended that it offered to reschedule the meeting, and subsequently reiterated its unconditional offer to return on May 4, 1990. The Union argued that under these circumstances—the fact that the employees appeared at the place of business as instructed, offered to reschedule the meeting, and later reiterated their offer to return—the employees had not demonstrated an ''unequivocal resolve not to accept reinstatement.'' *W.C. McQuaide, Inc.*, 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980).

By letter dated August 29, 1997, the General Counsel denied the Union's appeal ''substantially for the reasons set forth'' by the Regional Director. Thereafter, on September 11, 1997, the Union filed the instant request for review of the General Counsel's compliance determination pursuant to Section 102.53(c) of the Board's Rules and Regulations.[4] On September 19, 1997, the General Counsel filed a response.

[1] 311 NLRB 881 (1993).

[2] The Regional Director did not explicitly state that the employees' actions waived their right to reinstatement, but only that they tolled the Respondent's backpay obligation. However, the Charging Party has interpreted the Regional Director's determination to include a finding that the employees effectively waived reinstatement, and the General Counsel has not disputed that interpretation.

[3] The Respondent's March 30 letter stated in pertinent part as follows:

> What the NLRB would have us do is offer you an unconditional return to work at pre-strike levels of wages and benefits until such time as we give your Union the opportunity to bargain back to the post-strike levels of wages and benefits currently on the table. This we intend to do.
>
> Accordingly, without admission of any wrongdoing, we are hereby offering you the opportunity to return to work placement at pre-strike levels of wages and benefits. Please report to the Company's office on April 18, 1990 at 1:30 PM. If you do not report, we will assume you have no interest in returning to work.

[4] See also *Ace Beverage Co.*, 250 NLRB 646 (1980).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we have decided to grant the Union's request for review with respect to the following two issues.[5] The threshold issue presented here is whether the Respondent's March 30, 1990 letter constituted a valid reinstatement offer in compliance with the terms of the Board's court-enforced Order requiring that employees be offered ''immediate and full reinstatement to their former jobs.'' *Page Litho*, supra, 311 NLRB at 883. ''Initially, it is clear that the reinstatement obligation is satisfied only by a valid offer of reinstatement.'' *Consolidated Freightways*, 290 NLRB 771 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989). As stated in *Adsco Mfg. Corp.*, 322 NLRB 217, 218 (1996), ''A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional.'' An employer does not satisfy these requirements by merely expressing a desire to ''talk'' to a discriminatee about a ''job opportunity.''[6] In addition, the employer's offer must return the employee to his former position of employment with his former starting time.[7]

Here, the Union contends that the Respondent's March 30 letter did not state that the employees were to report for work on April 18, but merely invited the employees to attend a meeting. Further, the Union claims that the specified reporting time was not ''the regular starting time of employees.'' In his response, the General Counsel refers at one point to an April 18 ''meeting'' and acknowledges that the employees were told to report ''after the start of the day shift.'' Accordingly, we find that the Union has raised substantial and material issues concerning whether the Respondent's March 30 letter was a valid offer of reinstatement.

The second issue concerns the events of April 18 when, in response to the March 30 letter, the employees arrived at the Respondent's facility accompanied by two union officials and the Union's attorney. As indicated by the Union, the ''Board has long held that only where a proper offer is made and unequivocally rejected by the employees is the employer relieved of his statutory duty to reinstate.'' *W. C. McQuaide*, supra, 239 NLRB at 671. Specifically, the Union claims that on April 18 the Respondent's position was not that it wanted the employees to report to work. Rather, the Respondent intended to hold a ''meeting'' and would permit the union officials to attend but not the Union's attorney. As referred to above, the General Counsel's response variously describes the employees' actions on April 18 as ''report[ing] to work'' and ''attending [a] meeting.'' Thus, we find that the facts and circumstances asserted by the Union raise a substantial question whether the *McQuaide* standard has been satisfied in this case. If the Respondent expressed no intention to return the employees to work on April 18 and merely desired to conduct a ''meeting,'' it could well be maintained that the employees' refusal to attend the ''meeting'' without the presence of the Union's attorney did not constitute a waiver of their right to reinstatement. Accordingly, we shall also remand this issue for hearing.

ORDER

IT IS ORDERED that the Charging Party's request for review is granted with respect to the following two issues: (1) whether the Respondent's March 30, 1990 letter constituted a valid offer of reinstatement; and (2) whether certain employees waived reinstatement by insisting on the presence of the Union's attorney when they responded to the March 30, 1990 letter. These issues are remanded for hearing before an administrative law judge. In all other respects, the Charging Party's request for review is denied.

CHAIRMAN GOULD, dissenting in part.

Contrary to my colleagues, I would deny the Charging Party Union's request for review of the Regional Director's compliance determination in all respects, including with respect to the Regional Director's determination that certain of the former unfair labor practice strikers effectively waived reinstatement by insisting that the union attorney be allowed to accompany them when they returned to the facility in response to the Respondent's invitation and by leaving the premises when the Respondent refused to allow the attorney to do so.

As indicated by the Regional Director, once an employer makes a valid offer of reinstatement to employees, it is under no obligation to renew that offer once declined, and the employees are therefore entitled neither to backpay nor reinstatement after their refusal of the employer's reinstatement offer. See *D'Armigene, Inc.*, 148 NLRB 2, 15–17 (1964).

Here, the Regional Director found that the Respondent made a facially valid and unconditional offer of reinstatement to the employees by letter dated March 30, 1990. The letter stated in relevant part as follows:

> What the NLRB would have us do is offer you an unconditional return to work at pre-strike levels of wages and benefits until such time as we

[5] In its request for review, the Union also seeks review of various other compliance determinations made by the Regional Director which were also upheld by the General Counsel. The Union's request for review is denied with respect to all issues other than the two issues discussed above.

[6] *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992).

[7] *Deleet Merchandising Corp.*, 324 NLRB No. 165 (Nov. 7, 1997); *Duroyd Mfg.*, 285 NLRB 1, 3 (1987).

> give your Union the opportunity to bargain back to the post-strike levels of wages and benefits currently on the table. This we intend to do.
>
> Accordingly, without admission of any wrongdoing, we are hereby offering you the opportunity to return to work placement at pre-strike levels of wages and benefits. Please report to the Company's office on April 18, 1990 at 1:30 PM. If you do not report, we will assume you have no interest in returning to work.

My colleagues conclude that there is a substantial question whether this letter constituted a valid offer of reinstatement, essentially because it did not specifically identify what the employees' starting time or shift would be. In support, they cite the Board's decision in *Holo-Krome Co.*, 302 NLRB 452 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992). In that case, the issue was whether an employer's letter to an employee which stated that the employer wanted to ''talk'' to the employee ''regarding a job opportunity'' for which he was qualified was a valid offer of reemployment. Citing Board decisions holding that offers of reinstatement must be specific, unequivocal, and unconditional, the Board held that the employer's letter did not meet these requirements since it failed to mention a specific job or classification and did not actually offer a job to him. Id. at 454.

The instant case, of course, is readily distinguishable from *Holo-Krome*. Here, the Respondent's letter specifically stated that it was offering the employees an unconditional opportunity to return to work at prestrike wages and benefits as required by the NLRB, and requested the employees to report at a specific date and time. Although the letter did not also specifically state which shift the returning employees would be assigned to, no case is cited where the Board has required such specificity in an initial written offer.[1]

In finding a substantial question concerning the validity of the Respondent's reinstatement offer, my colleagues also rely on the Union's contention that the 1:30 p.m. reporting time specified in the Respondent's letter was not the employees' regular starting time and that the letter essentially invited the employees to attend a meeting rather than report to work. As discussed above, however, the Respondent's letter clearly indicated that the Respondent was offering to reinstate the employees, not just inviting them to a meeting. Further, no case is cited where the Board has invalidated an employer's otherwise unconditional reinstatement offer on the ground that the employees were invited to attend a meeting prior to returning to work. And cf. *Flite Chief, Inc.*, 258 NLRB 1124, 1125–1126 (1981), enfd. mem. 696 F.2d 1003 (9th Cir. 1982) (indicating that letter from employer's attorney which offered employees full and immediate reinstatement to their former positions and invited employees to reapply at the offices of the employer's client between noon and 4 p.m. would have been a valid offer of reinstatement if the employer had subsequently complied with it by actually assigning the returning employees to their former work schedules and shift).

As the Respondent's offer was facially valid, the only remaining question is whether employees clearly declined the Respondent's offer when they refused to return on the date and time indicated by the Respondent without the presence of the union attorney and thereafter left the Respondent's premises when the Respondent refused to allow the attorney to accompany the employees into the facility.[2] As indicated by the Regional Director, regardless of whether the employees were reporting to work or to attend a meeting, there was no legal basis for the employees' insistence on the presence of the union attorney upon their return to the facility, and the Respondent's alleged improper interrogation of employees during previous individual interviews about whether they were working elsewhere, whether they would come back to work under the terms set forth in the Respondent's final proposal, and whether they would sign something, was insufficient by itself to excuse the employees' failure to unconditionally return in response to the Respondent's offer.[3] Accordingly, consistent with the rule set forth in *D'Armigene*, in agreement with the Regional Director, I would find that the Respondent was under no obligation thereafter to respond to the Union's renewed offer to return on behalf of the employees.

[1] The primary case cited by my colleagues in this regard, *Deleet Merchandising Corp.*, 324 NLRB No. 165 (Nov. 7, 1997), is clearly distinguishable as it involved a situation where the employer's offer specifically stated that the employee would be assigned to a different work schedule or shift. See also *Associated Grocers*, 295 NLRB 806, 807 (1989).

[2] I assume, for purposes of ruling on this case, that the employees' rejection must be clear and ''unequivocal'' as indicated by my colleagues. I note, however, that the cases relied on by my colleagues for this proposition, specifically *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), and cases cited therein, are also distingushable from the instant situation. Those cases involved situations where an employer attempts to rely on employee statements or conduct *prior* to a valid reinstatement offer to establish that the employee has waived reinstatement. Here, the employee conduct occurred after the Respondent's valid and unconditional reinstatement offer.

[3] Cf. *Domsey Trading Corp.*, 310 NLRB 777, 778 fn. 3 (1993)(respondent employer remained obligated to reinstate unfair labor practice strikers who failed to report to work where they knew from conversations with previously recalled strikers that the employer was physically and verbally abusing the returning strikers).